

## **MALAYSIAN CASE LAW ON ISSUES OF ISLAMIC HOME FINANCE *BAY' BITHAMAN AL-AJIL* (BBA): AN ANALYSIS**

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**Abstract:** *Islamic Banking has been established since in the 1980s in Malaysia. Various Islamic Home Finance products have been introduced and practised in Malaysia. However, these products have been tainted with the issue of their inadequacy to deal with the issues of problematic housing projects such as late delivery of vacant possession, shoddy workmanship and failure of the developer to comply with the sale and purchase agreements. This paper aims to study the case law dealing with issues, other than issues of abandoned housing projects, in Islamic Home Finance involving Islamic Home Finance Bay' Bithaman Al-Ajil (BBA). This paper used shariah (Islamic Law), legal doctrinal, qualitative social and textual analysis research methodologies. This paper finds that the case law reveals weaknesses of the BBA. The outcome of this paper will improve the theory and practice of Islamic Home Finance BBA in Malaysia.*

**Keywords:** *Bay' Bithaman Al-Ajil (BBA); Abandoned Housing Projects; Terms and Conditions; Grievances and Losses of Purchaser Consumers; Justice*

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### **Introduction**

It is a trite practice in Malaysia that those who wish to purchase houses, apart from the conventional banks, they may also apply for Islamic home financing from Islamic banks. Normally, purchaser consumers will enter into housing contracts with the housing developers or property vendors purchasing the houses. Once the relevant documents are signed, the purchaser consumers will then apply to Islamic bank to finance the balance purchase price via any Islamic home finance products, for example *Bay' Bithaman al-Ajil* (BBA) (Md Dahlan & Aljunid, 2011; Md Dahlan & Syed Abdul Kader, 2010; *Khazim Malim v Bank Kerjasama Rakyat Malaysia Bhd* [2012] 3 CLJ 860 (High Court of Malaya at Kuala Lumpur).

Nonetheless, it is the observation of the authors that the terms under the Islamic Home Finance products (IHFP) are unable to provide protection to purchaser customers against losses and grievances in problematic housing projects (Md Dahlan, Fauziah & Shuib, 2017). As a result, many customer purchasers suffer unwarranted grievances and losses due to the inadequacy of the IHFP.

### **Literature Review**

In BBA, purchaser consumers are required to sign two (2) agreements *viz* Property Purchase Agreement (PPA) and secondly, Property Sale Agreement (PSA). The first agreement i.e. PPA states that the purchaser agrees to sell the purported house, being the house that the purchaser bought from the vendor developer, to the Islamic Bank. The price must be the same price as that used between the purchaser and the vendor developer (Md Dahlan & Aljunid, 2011; Md Dahlan & Aljunid, 2010; *Muhammad Daud bin Radzuan v. AmlIslamic Bank Bhd* [Civil Appeal No. (R2)-12B-2009] (High Court of Malaya at Kuala Lumpur)).

The second agreement is PSA. Under this agreement, the said house purchased by the Islamic Bank will be re-sold back to the purchaser at a mark-up price (the price being higher than the purchase price that was used by the purchaser and the vendor developer and between the purchaser and the Islamic Bank effected via PPA). The purchaser is required to repay the whole mark-up price to the Islamic bank in installment for certain duration until full settlement. The Islamic banks will get profit being the difference between the price stated in the PPA and the price stated in the PSA (Md Dahlan & Aljunid, 2011; Md Dahlan & Aljunid, 2010; *Bank Islam Malaysia Berhad v. Azhari Md Ali* [2012] 5 CLJ 920 (High Court of Malaya at Shah Alam)).

The above transaction, between the purchaser borrower and the Islamic Bank, is called *Bay' al-Inah* (Bank Negara Malaysia, 2009). Apart from *Bay' Inah*, in the opinion of the authors, BBA also consists of *Murabahah* transaction as it involves selling price at a mark-up rate as profit by Islamic banks effected via PSA.

It should be emphasized here that the theory and practice of *Bay' al-Inah* is still subject to debate among the *fiqh* schools of law as the transaction may fall into *riba'* (difference of prices involving time) or *helah* (trick) to justify *riba'* in transaction (al-Zuhayli, 1988).

Majority of Islamic Jurists reject *Bay' al-Inah* as the transaction is a void transaction. To Abu Hanifah, *Bay' Inah* is permissible if it involves a third party as an intermediary premised on *Istihsan* (equity) supported by the story of Zayd bin Arqam (*Arab-Malaysian Finance Berhad v Taman Ihsan Jaya Sdn Bhd & Ors (Koperasi Seri Kota Bukit Cheraka Bhd, third party)* [2008] 5 MLJ 631; al-Zuhayli, 1988).

According to Islamic Jurists, *Bay' Inah* transaction can fall into prohibited business activities based on a hadith (tradition) of the Prophet Muhammad (PBUH)– ‘there will come a time where people permit *riba'* in business’ (al-Zuhayli, 1988).

In the opinion of Assohibayn (Abu Yusuf and Muhammad al-Shaybani), Hanafi, Maliki and Hanbali schools, *Bay' al-Inah* will be void if there is a proof that shows an intention to commit sins (*riba'* (usury)) on the ground of the principle of *sadd dhara'i* (blocking the means). Secondly, they argued on the story of Zayd bin Arqam where Aishah R.A did not approve a transaction of buying and selling slaves via *bay' al-Inah*. Thirdly, on the reason that

there exist payment and ownership in the first transaction. Further, the jurists argued on the basis of a hadith of the Prophet Muhammad (PBUH) which prohibits *Bay' al-Inah* (al-Zuhayli, 1988).

Nonetheless, majority of the jurists such as Shafie and Zohiri schools allow it (*Bay' al-Inah*) but it is considered detestable/abominable (*makruh*). Abu Hanifah is of the same opinion with Shafie and Zohiri schools on *Bay' al-Inah*, viz it is valid as it complies with the contract pillars -- offer and acceptance (*ijab* and *qabul*). These two schools do not emphasize intention (i.e intention to use trick (*helah*) in order to justify *bay' al-Inah*) as only Allah knows what is the intention of each individual. According to these schools, *Bay al-Inah* is valid if there is no plan to apply *time* period of *excessive price* volatility. If otherwise, the application of *Bay' al-Inah* is void. To these schools, the hadith of the Prophet disallowing *Bay al-Inah* is not rejected by Imam Shafie and secondly, Zayd bin Abi Arqam himself did not follow it (al-Zuhayli, 1988; Bank Negara Malaysia, 2009; Bakar. 2009; *Malayan Banking Bhd v Ya'kup bin Oje & Anor* [2007] 6 MLJ 389 (High Court of Sabah & Sarawak at Kuching); al-Shawkani, 1357H).

Dr. Wahbah al-Zuhayli himself is the same opinion with the majority of the jurists i.e *Bay' al-Inah* is void (al-Zuhayli, 1988).

### **Problem Statement**

Although *Bay' Bithaman al-Ajil* (BBA) is a permissible under the principles of Islamic Transaction Law (muamalat), there is a contradictory view among Islamic scholars on the issue whether it is valid or not to be used as a means of financing Islamic banking. This writing discusses some views on legality of BBA as the basis of financing facilities. The first view is alluded by M.N. Siddiqi who described BBA as a single transaction for usury practice. Although BBA is allowed under Islamic Law, Siddiqi does not encourage it to be used by Islamic banks in their financing products (Muhammad Nejatullah Siddiqi, 1983). He mentioned:

"I would prefer that *Bai 'al-Muajjal* be removed from the list of permissible methods altogether. Even if we concede to its permissibility in legal form, we have the overriding legal maxim that 'anything leading to something prohibited stands prohibited' (*ma adda ila al-haram fahuwa haram*) ... "

The Council of Islamic Ideology Pakistan (1980) on the Elimination of Interest in its report also discourages the use of BBA for the following reasons:

"... although this mode of financing is understood to be permissible in Islam, it would not be advisable to use it widely and indiscriminately in view of the danger attached to it of opening a back-door for dealing on the basis of interest."

In Pakistan, Muhammad Taqi Usmani is one of the judges in the case of *M. Aslam Khaki v. Syed Muhammad Hashim* which was ruled that the mark-ups such as *bay' 'al-muajjal* (BBA) and *bay' al-murabahah* were not legal to be used as the basis for Islamic Banking products because of the existence of the elements of *riba'* (usury)(Islamic Research and Training

Institute, Islamic Development Bank, n.d.). In his judgment in *M.Aslam Khaki* case, also known as 'Historic Judgment on Interest (*Riba*)', he states:

"Mark-Up and Interest Unfortunately, while implementing this technique by the banks and the financial institutions, all the above points were totally ignored. What was done was to change the name of interest and replace it by the name of mark-up. The mark-up system as in vogue today has no concern with any real commodity whatsoever. In most cases there is no commodity at all in real sense; if there is any, it is never purchased by the banks nor sold to the customers after acquiring it. In some cases this technique is applied on the basis of buy-back arrangement which means that the commodity already owned by the customer is sold by him to the bank and is simultaneously purchased by him from the bank at a higher price which is nothing but to make fun of the original concept. In many cases it is done merely on papers without a genuine commodity to be sold and purchased. Moreover, this technique is applied indiscriminately to all the banking transactions having no regard whether or not they involve a commodity. The procedure is being applied to all types of finances including financing overhead expenses, payment of bills etc. The net result is that no meaningful change has ever been brought about to the system of interest on the assets side of the banks. Therefore, all the objections against interest are very much applicable to the mark-up system as in vogue in Pakistan and this system cannot be held as immune from any issues"(Yaakub & Hasshan, n.d.)

In addition to the views that BBA described as a *riba*' transaction, there are also some scholars who liken BBA to *bay'* *'al-inah* where *bay'* *'al-inah* is not accepted by most Islamic scholars. For example, according to the Hanafi sect, *bay'* *'al-inah* contract is invalid if it does not involve third parties between the seller and the original buyer. According to the Hanbali and Maliki schools, *bay'* *'al-inah* contract is illegal because it is only involves transaction matter of indebtedness with the imposition of interest/*riba*' (Adawiah, 2003).

Before discussing BBA products more profoundly, it is best to look at the arguments from the Qur'an that prescribed certain rules on sales with delayed or deferred payments (BBA). In the Qur'an, Allah has said that:

"O ye who believe! When ye deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing Let a scribe write down faithfully as between the parties: let not the scribe refuse to write: as Allah Has taught him, so let him write. Let him who incurs the liability dictate, but let him fear His Lord Allah, and not diminish aught of what he owes. If they party liable is mentally deficient, or weak, or unable Himself to dictate, Let his guardian dictate faithfully, and get two witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind her. The witnesses should not refuse when they are called on (For evidence). Disdain not to reduce to writing (your contract) for a future period, whether it be small or big: it is juster in the sight of Allah, More suitable as evidence, and more

convenient to prevent doubts among yourselves but if it be a transaction which ye carry out on the spot among yourselves, there is no blame on you if ye reduce it not to writing. But take witness whenever ye make a commercial contract; and let neither scribe nor witness suffer harm. If ye do (such harm), it would be wickedness in you. So fear Allah. For it is Good that teaches you. And Allah is well acquainted with all things. If ye are on a journey, and cannot find a scribe, a pledge with possession (may serve the purpose). And if one of you deposits a thing on trust with another, let the trustee (faithfully) discharge his trust, and let him Fear his Lord conceal not evidence; for whoever conceals it, - his heart is tainted with sin. And Allah knoweth all that ye do."(Al-Baqarah (2): verse 282).

Sales with deferred or delayed payments have been practiced since the time of Jahiliyyah or pre-Islamic and subsequently continued after the advent of Islam. Dr. Yusuf al-Qardhawi, (1995) has mentioned two (2) examples of Prophet Muhammad's (PBUH) practice of indicating the necessity of trading and pending delay or delay. For example, a practice of the Prophet Muhammad (PBUH) who bought some foods from a Jew by mortgaging his armor as a guarantee and made payment in deferment. In addition there is a hadith narrated by Jabir who mentioned that the Prophet (PBUH) had bought a camel in Medina and made repayment on a prolonged/deferred/delayed basis.

Based on the above Qur'anic verses and the Sunnah of Prophet Muhammad (PBUH), it is clear that sales on deferred or delayed payments are permissible in Islam. BBA is a kind of exchange contract and is not a loan therefore a repayment is in line with the permissible transaction category. However, disputes arise in deferred sales relative to the increase in prices compared to the prices paid in cash. In other words, there is an increase or difference if the buyer wants to pay by installments within a certain period of time as compared to the payment in cash or at once. The question is: Is this allowed by Islamic Law?

According to Shaykh al-Uthaymin, who says Ibn Taimiyah is of the view that such an increase is justified because both parties (vendor and purchaser) benefit from a sale contract. Sellers earn higher profits while buyers get the intended property or purchased goods and get a chance to pay in installments. Al-Qardhawi (1995) argues that the time and means of payment are elements that can influence the selling price. He based his opinion on the principle of *istishab al-Hukm* that is the nature of the permissible facility expounded under the general principles of Islamic Law of transaction until and unless it is expressly and explicitly proven otherwise by *nass* (authority) of the Quran and/or the Sunnah of the Prophet (PBUH). Second, he argued that what is prohibited in Islam is '*riba*' in the course of a loan and not a trade transaction. The scholars also rely on the Qur'anic verse which means, "God wants to alleviate (burden of difficulty), because man is made weak."

Some scholars believe that sales with deferred charges/mark up price are allowed provided that the market price/sale price is set at the beginning of the contract and agreed between the two parties since at the outset. In other words, the sale price in cash and the selling price on a deferred or installment basis is different nature of transaction under Islamic law and should be differentiated by rules.

Hameed (2016) explains that the difference between a contract of sale and a Shariah-based loan contract is different because sales contract is based on equity and common interest, while

the loan contract is based on interest profit/usury. This means that in a sale contract, both sides are ready to profit from each other. The buyer benefits by deferring payment while the seller is allowed to benefit by raising the sales price in delay payment or in installment. However the price increase in the loan is not allowed as it will cause *riba'* which is prohibited by Islam.

Al-Kasani from the Hanafi School has argued that since sales are contracts based on the equation of value, then the difference in prices between sales in cash and deferred is allowed. Al-Dusuqi from the Maliki School has argued that in the *murabahah* contract (mark up price), the seller is required to inform the customer the amount of profit that has been taken from the contract. As mentioned above, the payment of a *murabahah* sale contract may be paid in cash or in installments within prescribed period. This means that in a deferred sale it is allowed to put a price or profit different from the price in cash. Al-Sharbini from the Shafie and Ibn Taimiyyah schools argue that the postponement can lead to the difference in selling prices (Hameed, 2016).

Hasan (2011) agrees that the truth of raising the selling price for the postponement of payments is justified by previous scholars such as Imam al-Shafi'i, Ibn 'Abidin, al-Kasani, Ibn Rushd, al-Shatibi and al-Tabari. However, he posed a question that whether the current practice of BBA in Malaysia (the Malaysian BBA) is in line with the postponement contract as understood by Islamic scholars?

Be that as it may, according to contemporary researchers, the following are salient issues involving BBA as practised in Malaysia (Md Dahlan, Mohd Noor & Shuib, 2017):

- 1) No special obligations of the Islamic Bank (vendor) to protect the rights and interests of the aggrieved purchasers in problematic housing projects;
- 2) Non-compliance of the principle of *al-ghunmu bi al-ghurmi* i.e. the profit is not commensurate with the risk. For example the Islamic bank still pressing the customer purchasers to pay installment even though the housing project is problematic and abandoned;
- 3) The defaulting customer purchasers have to pay full sale price even though the repayment period is not yet expired i.e. still subsists;
- 4) The terms in the BBA contains *gharar* elements in that there is no corresponding obligation on the Islamic banks to be responsible if the housing projects become abandoned or problematic to the chagrin of the customer purchasers;
- 5) The beneficial ownership spelt out in the BBA is not clear thus may lead to uncertainty and irresponsibility of the Islamic bank to do justice to customer purchasers;
- 6) The undertaking by developers and lawyers is not fully clear and not coherent in that the developers and the developers' lawyers are not responsible to refund any moneys they received in the event the housing projects become problematic but the Islamic banks pursue legal action against the customer purchasers;
- 7) The issues of conflict of interest between customer purchasers, Islamic banks and lawyers, i.e. in some situations the lawyers act for both the customer purchasers and the Islamic banks contemporaneously thus this may lead to

- conflict of interest and can be detrimental to customer purchasers' interests; and,
- 8) There is no *khiyar* (option) term in the BBA which can lead to injustices to customer purchasers.

### **Research Questions**

- a. What are the case law that having dealt with issues Islamic Home Finance product *Bay' Bithaman al-Ajil* (BBA)?
- b. What are the issues raised and determined upon in the case law?
- c. Had the case law provided justice to the purchasers?
- d. What are new suggestions to improve the product?

### **Objectives**

- a. To study the case law involving issues in Islamic Home finance products *Bay' Bithaman al-Ajil*.
- b. To study the issues that the case law dealt with.
- c. To propose improvements in the Islamic Home Finance *Bay' Bithaman al-Ajil* and practices in face of the issues as identified and discussed through the case law.

### **Research Methodology**

The authors used *shariah* (Islamic Law) and legal research methodology to explain and analyze the case law on issues involving Islamic Home Finance *Bay' Bithaman al-Ajil* (BBA). The legal research is in a form of hybrid in nature. It consists of applied research, academic research, analytical/critical research, descriptive research, library-type and experimental study based on the reported and unreported case law. The research activities under this heading include the discovery of the principles, rules and case law in order to explain and resolve the identified problems guided by the set objectives (Zahraa, 1998).

The second methodology is the social research methodology using textual legal analysis on the reported case law. The authors chose a qualitative textual legal analysis as the authors wish to examine in detail issues and discussion in the BBA. The sources are from the reported case law from common law journals in Malaysia. These sources are considered primary data sources analyzed through textual analysis (Silverman, 2000; Yin, 1994; Yin, 2000). Apart from this source, the authors also referred to secondary sources such as journal articles and research reports detailing the relevant issues in the BBA.

The data sources are reported case law published by renowned law journals in Malaysia. The scope of this writing is on Islamic Home Finance BBA's issues not involving abandoned housing projects. The data collection involves finding the relevant reported case law from the journals and the authors analysed using *shariah* and legal research methodology and qualitative textual analysis guided by the objectives and the research questions.

### **Findings**

Generally speaking, BBA refers to deferred sales. It is important to note that the word itself is meant to withhold future agreed-upon payments. This suspension may be paid at once or in installments as agreed between the parties. Thus, by definition, BBA may be in any form of

contract in which payment is made within the deferment within the prescribed period, whether it is a contract of *murabahah* (mark up price transaction), *musawamah* (the selling of a commodity at an agreed upon price irrespective of the original purchase price. In other words, the seller is not required to disclose to the buyer what the cost price was) etc. However, it does not apply to the *bay 'al-salam* (full payment is made in advance for specific goods (often agricultural products) to be delivered at a future date) contract payment for *bay 'al-salam* must be paid to the seller at the commencement of the contract (Hasan, 2011).

The BBA concept has been adopted and given some changes to form the currently practised BBA in Malaysia. The short term repayment is known as *murabahah* while the long-term repayment is called BBA (deferred payment). The *murabahah* payment is usually paid simultaneously but BBA is paid in installments within certain prescribed period. However, Middle Eastern countries do not differentiate BBA for *murabahah* and *murabahah* terms used to represent both (short and long term repayment).

The BBA cases that have been dealt with by courts involving non-abandoned housing projects are as follows:

- a) *Bank Islam Malaysia Berhad v. Azhari Md Ali* [2012] 5 CLJ 920 (High Court of Malaya, Shah Alam);
- b) *Public Bank Bhd v. Mohd Isa Mohd Nafidah* [2013] 1 CLJ (Sya) 448 (High Court of Malaya, Kuala Lumpur);
- c) *Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor and Other Appeals* [2009] 6 CLJ 22 (Court of Appeal, Putrajaya);
- d) *Bank Islam Malaysia Bhd v. Azhar Osman & Other Cases* [2010] 5 CLJ 54.
- e) *Malayan Banking Bhd v. Marilyn Ho Siok Lin* [2006] 3 CLJ 796 (High Court of Sabah & Sarawak in Kuching);
- f) *Arab-Malaysian Finance Bhd v. Taman Ihsan Jaya Sdn Bhd & Ors; (Third Party) and Other Cases* [2009] 1 CLJ 419 (High Court of Malaya in Kuala Lumpur);
- g) *Malayan Banking Bhd v Ya'kup Oje & Anor* [2007] 5 CLJ 311 (High Court of Sabah & Sarawak in Kuching).

***Bank Islam Malaysia Berhad v. Azhari Md Ali [2012] 5 CLJ 920 (High Court of Malaya, Shah Alam)***

The above case involves a purchase of land together with a bungalow house to be constructed on the land between the plaintiff (Bank Islam Malaysia Berhad) and the defendant (Azhari).

The defendant in this case bought a piece of land and intended to finance the cost of erecting a bungalow house on the land through BBA facility of the plaintiff bank. To get the funds to finance the purchase the land and the cost of construction of the bungalow house, the defendant applied for a BBA facility from the plaintiff. The Plaintiff approved the application of this facility to the defendant. The purchase price of the land acquisition and construction cost of the bungalow house was Malaysian Ringgit (MYR) 123,235.65 (USD 29,223.54). Through the Property Sale Agreement (PSA), the defendant was required by the plaintiff to pay the selling price of MYR 305,284.80 (USD 72393.83) to the Islamic bank in monthly installments until full settlement.

The defendant alleged that the BBA so entered was an illegal transaction under Islamic law as it involved a non-existent housing unit at the time when the agreement was signed. Thus, the



defendant refused to settle the monthly installment repayment to the plaintiff. The plaintiff took a legal action against the defendant and withdrew the facility. The plaintiff also demanded from the defendant the balance sale price after deducting the monthly installment repayment made by the defendant. The balance sale price payable by the defendant to the plaintiff was MYR 282,445.01 (USD 66977.71).

The defendant also alleged that the construction of the bungalow house was only completed at the stage of seventy three per cent (73%) and thus entitled only to a total sum of payment for that stage. However, in this case, the defendant contended that the plaintiff had wrongly claimed a progressive payment of ninety five percent (95%) completion.

The defendant also alleged that the progressive payments made by the plaintiff to the contractor were not supported with the architect's certificates indicating due completion of the purported progressive construction works. According to the defendant, his house was in bad condition, no fence or door, no sewerage system and had an incomplete electrical wiring system. These circumstances indicated that the plaintiff had withdrawn money without making detailed inspections and verifications. The defendant asserted that if the plaintiff's inspections were conducted by taking into account the type of work, workmanship and high standard of construction works, of course the defect and the damage would have been known to the plaintiffs. Hence, the defendant stressed that the withdrawal of money for the financing of the construction of the house was made arbitrarily by the plaintiffs and it also indicated that the plaintiffs had failed to act in line with the terms stipulated in the sale of the land.

Furthermore, the defendant claimed he had spent additional money of MYR 39,197.00 (USD 9,306.03) to complete the construction of the house. He also explained that the house built did not have a certificate of fitness for occupation (CF) and therefore the house was unsafe and not suitable for occupation.

The issues before the court are as follows:

- 1) Are both property sale and purchase agreements based on BBA (PPA and Property Purchase Agreement (PSA)) principles valid and bind the defendants?
- 2) Are there any breaches of contract by the defendant?
- 3) Did the plaintiffs act in accordance with the terms of the PPA and PSA in financing the construction of the bungalow or otherwise had the plaintiff contravened the terms?

The Court ruled that in accordance with the decided cases involving BBA and on the basis of the defendant's own testimony, the BBA's financing contract was valid and binding on the defendant as there was no evidence indicating that there were any elements of fraud, coercion or an undue influence during the signing of the BBA agreement.

The court also ruled that the defendant had breached the terms of the agreed BBA contract, in particular relating to the repayment of the facility to the plaintiffs when he failed to make the repayment of the fixed monthly installment to the plaintiff bank.

According to the court, clause 18 of the construction contract emphasizes that the certificate from the architect (Architect's Certificate) is to confirm that the construction work has been fully completed and any complaints on the defects of such construction shall be made known by the defendant within six (6) months of the delivery of vacant possession of the bungalow

how by the contractor. This clause does not specifically refer to the method of issuing progressive staged payments to the contractor. Therefore, the defendant's claim that the architect's certificate is required for each progressive payment is baseless and without ground.

The learned judge also referred to the case of *Kian Lup Construction v Hong Kong Bank Malaysia Bhd* [2002] 7 CLJ 32 where it was decided that the relationship between the plaintiff and the defendant was only based on the relationship of creditors and debtors. The issue of whether the plaintiff had the responsibilities and fiduciary relationship with the defendant is irrelevant and should not be questioned at all. The judge also stated that the procedure of the visit to the construction site conducted by the plaintiffs (Islamic Bank) for the purpose of verification before the issuance of progress claims by the contractor is consistent and not contrary to the provisions in the construction agreement. Furthermore, it is not appropriate to require the plaintiff to conduct a detailed inspection or to arrange the architect to provide proof of completed progressive construction works before approving the claim for progressive payment, while, at the same time, the construction agreement does not require the plaintiff to do so.

The court also found that, based on the witnesses and documents filed during the hearing, it was clear that the defendants themselves had knowledge of the placement payments made by the plaintiff under the name of Shahbuilders (M) Sdn Bhd. This is because every letter of claim payment by the contractor has been sent a copy to the defendant. This matter was never denied by the defendants. The defendant's actions indicated a waiver of his right to dispute payment of such progress payments. The principle of this law is known as a waiver principle - refer to *Norashikin v. Champion Motors (M) Sdn Bhd* [1971] 1 LNS 93; [1971] 2 MLJ 217.

In conclusion, the court ruled that the plaintiff had acted in accordance with the terms of the sale of the property and the BBA (PSA and PPA), particularly in the process of withdrawal of financing for the construction of the defendant bungalow house. The court also found that the claim of a defendant's loss was not supported by evidence. Thus, the court rejected the defendant's counterclaim. The court allowed the plaintiff's claim with no order for costs.

***Public Bank Bhd v. Mohd Isa Mohd Nafidah [2013] 1 CLJ (Sya) 448 (High Court of Malaya, Kuala Lumpur)***

In this case the plaintiff provided the defendant with an Islamic home facility of *Bay Bithaman al-Ajil* (BBA) to finance a purchase of a property of a single storey-bungalow to be built on Plot No. 11, Desa Kebun Indah, Klang, Selangor, which is situated on a piece of land known as No. Lot 4060, Place of Kampong Jalan Kebun, Mukim Klang, State of Selangor Darul Ehsan ('the property'). Through the BBA, the purchase price spelt out in the PPA was Malaysian Ringgit (MYR) 217,887.00 (USD 52,343.83) and the sale price stated in the Sale Agreement cum Assignment (SACA) by the bank (plaintiff) was MYR 434,328.57 (USD 104,340.42).

The defendant alleged that subject matter (BBA) in the BBA does not exist at the conclusion of the contract. This contract was a house that has not yet been completed. Second, the defendant argued that the subject of this contract was not suitable to be a security for the facility granted because the defendant had not yet obtained the right of ownership of the property.

Furthermore, the defendant argued that the developer, Syahira Development Sdn Bhd, had no housing development license as required by the Housing Development (Control & Licensing) Act 1966 (Act 118), the developer has not yet obtained the separate document of title to the property so purchased and that the BBA facility progressive disbursement was not made according to the progress stage of construction work.

Instead the plaintiff replied that the plaintiff was only a bank that financed the purchase and construction of the property of the defendant and not as an advisory bank. Secondly, the plaintiff had no responsibility to ensure that the developer obtains a housing development license and/or has applied for ownership of a subsidiary. Furthermore, the plaintiffs argued that the plaintiff had paid the BBA facility to the developer according to the terms and conditions set out in the BBA and the sale and purchase agreements.

The court ruled that Malaysian Islamic jurists allowed the use of BBA and/or *Bai al-Inah* as they considered the BBA/*Bai al-Inah* can be applied for pending completion houses not just involving the physical sale of completed house. This is because the right to buy and sell of a subject matter including an incomplete/pending completion house is accepted under Islam Law as the latter regards the right as a property too. According to the majority of Islamic jurists, customers can sell their proprietary and financial rights (*haq maliyy*) to banks.

On the issue of imperfect rights/beneficial right because the customer only pays ten percent (10%) of the purchase price and then sells the incomplete property to the bank, the court decided that if the subject matter (the house) was clearly in existence and might be existed and delivered in the future, this would not lead to *gharar al-fahish* (exorbitant *gharar* – uncertainty in the contractual terms leading to losses). On the issue of imperfect title/beneficial ownership over property, the court referred to a resolution of the 123<sup>rd</sup> meeting of the National Shariah Advisory Council of the National Bank (SAC) in which the SAC stated that shariah recognizes the effect of the transfer of legal title of sale and purchase of a legitimate right even though there is no change in the name of the registrar. In other words, shariah recognizes beneficial ownership over property or asset.

Furthermore, the court ruled that the plaintiff's responsibility of the bank was only a financier. The plaintiff bank is not responsible to investigate or ensure the validity of the sale and purchase agreement between the customer purchaser and the developer. Due to the payment made to the developer at the request of the customer purchaser, the latter must be responsible under the BBA financing agreement without questioning the illegality of the BBA and the sale and purchase agreement.

***Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor and Other Appeals [2009] 6 CLJ 22 (Court of Appeal, Putrajaya)***

In this case there are twelve (12) cases involving Islamic home finance. In this case, the learned judge in the High Court ruled out that *Bay 'Bithaman al-Ajil* (BBA) was contrary to Islam. The plaintiff in all these cases was Bank Islam Malaysia Berhad (BIMB).

In the above twelve (12) cases, the learned judge questioned the validity and enforceability of the BBA contract on two (2) reasons:

- a) That the BBA contract is onerous than a conventional lending-based which is prohibited in Islam;

- b) That BBA contract implemented in Malaysia is unacceptable to the four (4) schools in Islam law.

The learned judge in the High Court ruled that the BBA contract has so far been accepted by only one sect (school) under Islamic law. This position cannot be said to be sufficient to state that BBA has been approved by the Islamic religion, i.e. by all sects under Islamic Law.

However, in the Court of Appeal (Raus Sharif, Judge of the Court of Appeal), the Court of Appeal opined that BBA contracts and conventional debt agreements are not the same. This is because BBA is an outright sales agreement while a conventional loan agreement (based on usury) is a money lending transaction. The advantages in BBA are different from the benefits of the conventional loan transactions.

Furthermore, the Court of Appeal decided that the comparison between BBA contracts and conventional loan agreements is irrelevant. This is because the law governing BBA is the same as the law governing the conventional lending transactions. The relevant law on this matter is the contract law and the same contractual principle applies in determining relevant cases, including the Islamic Home Finance BBA and conventional home finance. If a contract is not affected by fraud, coercion, undue influence and other inequitable and dishonest means, the court is responsible to protect the interests of the parties and ensure the terms of the contract are duly and fully carried out by the parties. In this respect, the learned judges in the Court of Appeal have referred to the case of *Bank Kerjasama Rakyat Malaysia Bhd v. Emcee Corporation Sdn Bhd* [2003] 1 CLJ 625 (Court of Appeal), referring to Abdul Hamid JCA's decision.

According to the High Court, if an element in Islamic banking products is accepted by a sect, this (the acceptance) is insufficient to deem the product acceptable under Islamic law, as the product is rejected by the other Islamic sects/schools. However, the Court of Appeal dismissed this view. The Court of Appeal opined that the High Court judge erred when he translated the meaning of 'not involving any element not approved by Islam'. This is because according to section 2 of the Islamic Banking Act 1983, 'Islamic banking business' does not mean banking business whose purpose and operation is accepted by all Mazhabs (Islamic Law's sects/schools). Secondly, the Court of Appeal is of the view that Islam is not limited to only four (4) schools as the legal sources. What is known is that Islamic law is based on the Qur'an and hadiths and other secondary sources. There are other secondary sources in Islamic law besides the sources of the four (4) schools.

The Court of Appeal also ruled that it was a misdirection, when the High Court had exercised a power to determine whether an Islamic Home Finance BBA was in compliance with the requirements of Islamic law or not. This is because only eminent Muslim jurists can determine whether a product is accepted by Islam or otherwise, not the High Court. These eminent Muslim jurists are the Bank Negara Shariah Advisory Council (SAC) referred to in section 13A of the Islamic Banking Act 1983. This matter was settled in the case of *Adnan bin Omar v Bank Islam Malaysia Berhad* (unreported) (Supreme Court) and the case of *Datuk Hj. Nik Mahmud Nik Daud v. Bank Islam Malaysia Berhad* [1998] 3 CLJ 605 (Court of Appeal).

According to the Court of Appeal, the High Court's judicial act in determining and disposing the issue involving Islamic Home Finance BBA by ruling that the BBA contract was illegal,

had clearly violated the doctrine of *stare decisis* (judicial precedent), in that the High Court has transgressed the decision of the Higher Court. On the other hand, the High Court is duty bound to follow the principles adopted by the higher courts such as the Court of Appeal and the Federal Court (*Dato 'Tan Heng Chew v Tan Kim Hor & Another Appeal* [2006] 1 CLJ 577).

***Bank Islam Malaysia Bhd v. Azhar Osman & Other Cases* [2010] 5 CLJ 54 (High Court of Malaya at Kuala Lumpur)**

In this case, the plaintiff bank sued the defendants for having failed to repay the Islamic house finance facility – *Bay' Bithaman al-Ajil* (BBA). The plaintiff bank claimed that they are entitled to claim for the full sale price of the property as stipulated in the Property Sale Agreement (PSA), irrespective of a premature termination. The plaintiff bank submitted that the court should honour and enforce the clear written terms of the contract and should not interfere with the intention of the parties by imputing any other terms. Since the parties had agreed as to the amount of sale price as stipulated in the PSA, the defendant was under a legal obligation to pay the full sale price, irrespective of when a breach occurred. Further the plaintiff bank contended that by virtue of the doctrine of *stare decisis*, the High Court is bound by the decision of the court of appeal in *Lim Kok Hoe* which upheld and acknowledged that the obligation to pay the full sale price under the PSA. The judge – Rohana Yusuf rejected the contentions of the plaintiff bank. She decided that the plaintiff bank is not entitled to claim the full purchase price of the property when there is premature termination. The plaintiff bank should not claim the unearned profit. In other words, the plaintiff bank should grant rebate. This policy is consistent with the requirement of section 266(1) NLC and on the ground of equity. In respect of the issue of *stare decisis* that the instant High Court is duty bound to follow the decision of Court of Appeal in *Lim Kok Hoe*, Rohana Yusuf J was of the view that this issue should not have arisen, at all, as the issue of quantum had not been canvassed before the Court of Appeal. Unlike the instant High Court case, where the issue of quantum is canvassed and examined.

***Malayan Banking Bhd v. Marilyn Ho Siok Lin* [2006] 3 CLJ 796 (High Court of Sabah & Sarawak in Kuching)**

In this case, the defendant obtained a financing facility through *Bay 'Bithaman al-Ajil* (BBA) from the plaintiff, Malayan Banking Bhd, to finance the purchase of a property known as No. Lot 8620, Block 16, Kuching Central Land District. Through the BBA, the plaintiff purchased a property from the defendant for MYR 500,000.00 (USD 122,599.29) and then the plaintiff sold the property to the defendant for MYR 995,205.64 (USD 244,014.71). The defendant had to pay the sale price (MYR 995,205.64) in two hundred forty (240) months in installments. However, the defendant defaulted on paying the monthly installment after 14 months of the execution of the BBA facility agreement. The Plaintiff took a legal action against the defendant to sell the property in a public auction to settle off the defendant's debt amounting to MYR 928,589.12 (USD 227,688.52) which was the residual sale price after deducting against the installment payment which had been paid by the defendant to the plaintiff bank. The defendant argued among others that the plaintiff's actions were unfair because the sale price included profits for the entire sale price 240-month period. Thus, the defendant argued that the debt amount that he owed to the plaintiff bank should be substantially lesser in correspond with the period of his enjoyment over the property and the facility, not the whole sale price period of two hundred forty (240) months.

The judge decided that it is unfair for the bank to collect the entire sale price when the facility had been terminated immature (pre-mature). This is based on *Affin Bank Bhd v. Zulkifli Abdullah* [2006] 1 CLJ 438. Based on this case the Judge decided that the plaintiff is only entitled to claim MYR 598,689.10 (USD 146,790.32) as at 31 May 2006. This amount is the total purchase price of RM 500,000.00 (USD 122,599.29) and the total profit for the expired period tenure (from 14 May 2002 to 31 May 2006), excluding the un-expired period, amounting to MYR 156,614.74 (USD 38,401.207).

***Arab-Malaysian Finance Bhd v. Taman Ihsan Jaya Sdn Bhd & Ors; (Third Party) and Other Cases* [2009] 1 CLJ 419 (High Court of Malaya in Kuala Lumpur)**

In this case the defendants purchased properties from the third parties (housing developers) and had paid part of the purchase price. To finance the balance of the purchase price, the defendants applied for an Islamic Home Finance facility from the plaintiffs through *Bay Bithaman al-Ajil* (BBA). However later, the defendants breached the BBA agreement. As a result, the plaintiff took a legal action by applying to the High Court for an order for sale of the properties to settle off the defendants' liabilities. The defendants argued that the BBA transaction was illegal under Islamic law and had violated the provisions under the Islamic Banking Act 1983 or Islamic Banking and Financial Institutions Act 1989. According to the defendants they were required to pay the whole total sale price amounted to MYR 992,363.40 (USD 242,584.35), whereas the purchase price was only amounted to MYR 346,000.00 (USD 84,578.80) although the financing facilities had been terminated before the sales' price repayment period ended i.e. before the expiry of the whole sale price repayment period.

The High Court (Abdul Wahab Patail, J) decided that, *inter alia*, when the bank became the property owner through the novation agreement or through direct purchase from the developer (vendor) and then sold the property to the customer purchaser, such a sale of the property to the customer purchaser was a *bona fide* sale. In this case the sale price to the customer purchaser should comply with the principle of equity and justice. Thus, the act of the bank by imposing on the customer purchaser to pay the whole sale price amounted to MYR 992,363.40 (USD 242,584.35), before the expiry of the whole sale price repayment period was inequitable and unfair to the customer purchaser. According to the High Court, the total amount of the sale price that the customer purchaser should repay to the bank before the expiry of the whole repayment period should be in pro rata and equitable to the consumed period and not involving unconsumed period which is not yet occurred.

In this case, the court opined that, the property sale to the customer purchaser was not a *bona fide* sale but was a financing transaction. The court decided that the prescribed profit rate that the Islamic bank applied was the rate for the whole sale repayment period was unjust to the customer purchaser and contrary to the spirit and intent of the Islamic Banking Act 1983 and the Banking and Financial Institutions Act 1989.

Furthermore the High Court is of the view that, the terms of Islam and the religion of Islam are not limited to any sect/school only. Islamic financing facilities which are said to be in line with Islamic law requirements should be the financing facilities that are accepted by all Islamic schools. These facilities (the BBA) are not only applicable and offered to Muslims of certain sects for example to the Shafie sect. If the facility is offered to public Muslim, irrespective of their schools (Mazhab), then the test to be used by the Civil Court is that the facility shall also be acceptable under all sects/schools in Islam, not just by a particular sect/school. The acceptability of Islamic financing facilities by a sect/school under Islamic

law (Mazhab) but not accepted by other sects/schools (Mazhabs), is not a financing facility approved by Islam.

The learned judge of the High Court also opined that the repayment of the sale price is deemed a credit or debit transaction which is only allowed under Islamic Law if no usury/interest is imposed. However, if additional profit is imposed by the seller on the purchaser during the repayment period, the additional profit is considered as a usury/interest which is prohibited by Islam.

***Malayan Banking Bhd v Ya'kup Oje & Anor [2007] 5 CLJ 311 (High Court of Sabah & Sarawak in Kuching)***

In this case, the plaintiff provided an Islamic Home Finance facility to the defendants under the principle of syariah *al-Bay 'Bithaman al-Ajil* (BBA) to finance the purchase of a property with a total value of MYR 80,094.00 (USD 19,659.23). The Defendant defaulted on repayment of the installment of MYR 16,947.62 (USD 4,160.250) to the plaintiff. On the contravention of the defendant, the plaintiff took a legal action for an order for sale of the property pursuant to section 148(2)(c) of the Sarawak Land Code (Cap. 81). As a result, the defendant was demanded to settle the debt amounted to MYR 167,797.10 (USD 41,179.20) being the full sale price of the purported property to the plaintiff as of June 26, 2006. The defendant alleged that the amount requested by the plaintiff was excessive and extreme, contravening the principle of justice and thus applied to the court for a just and fair decision.

The issue raised in the Court was whether the court may authorize an application for an order for sale based on the full amount of the price (the full sale price) or the Court may order other appropriate sale price based on the principle of justice?

According to the Court pursuant to section 148(2)(c) of the Land Code of Sarawak, it is a mandatory case of the Court to ensure justice is done and the court may not issue the order if the order can bring injustice and 'cause to the contrary' to the defendant. This is also emphasized under section 256 National Land Code 1956.

The court ruled that in Islam, the exercise of justice is of utmost importance. The importance of implementing this justice should also be clearly implemented in the Islamic Home Finance products. The responsibility for implementing justice is clearly stated in the Quran and Hadith. In Islam all types of transactions must be based on the principle of 'no risk no gain'.

In Islam the element of capital use, effort and risk should be clearly proven. If otherwise, such transaction can be a usury transaction 'and may cause the bank being engaged in illegal transactions'. The court states the determination of profits and the certainty of return on investment as opposed to the concept of profit sharing in Islamic banking can resemble 'usury' in business. Furthermore, according to the court, the fundamental nature of Islamic finance is that it does not involve fixed interest rates or profits. It should be based on profit and loss-sharing contracts - 'equity based financing'. In other words, Islamic banking emphasizes that Islamic banks should become 'venture capitalist' and not money lenders.

According to the High Court, Islamic banking has now opted to use the concept of 'trickery' (*helah*) to legalize a transaction despite the intention that the transaction violates Islamic law as long as the form used is in line with the will of Islam which prohibits the practice of 'usury'. This approach was rejected in Pakistan through the judgment of Judge Maulana

Muhammad Taqi Usmani in Pakistan's Supreme Court. In the judgment, the Supreme Court ruled that *murabahah* was a kind of transaction accepted by Islam. However, if the use is not implemented carefully and does not ensure the conditions of the mark-up price, this transaction may be misleading. Among the conditions of *murabahah* is that it can only be used when customers and banks intend to buy commodities. The bank will buy the commodity from the manufacturer and after acquiring the title and physically control of the commodity, the bank sells it to the customer. All these elements need to be proven including their legal and logical consequences. The bank shall also be prepared to take risks on the ownership of the commodity. These elements must be adhered to. Otherwise, the transaction may fall into the meaning of interest-based financing (usury). According to the Supreme Court of Pakistan, in *murabahah* the commodity owner can sell to the customer at the price he likes dependent on supply and demand. The rates can be more than the market price with buyer's consent. This is justified by Islam. When a seller sells a commodity at a high price in cash transactions, he can also sell at a high price on credit sales subject to the conditions he does not commit fraud, undue influence, duress or forcing purchasers to buy the commodities unwillingly.

The Supreme Court of Pakistan is fully aware of the views of some parties that price increase in cash transaction is permissible. However, in the opinion of this group, sales based on deferred payment with the price increase corresponding with time has created a perception that the increase can lead to interest (usury) transaction.

In view of the Supreme Court, the opinion of this group is a misdirection. According to the Supreme Court, any increase in sale price rate due to late payment is considered usury if the subject matter is money on both parties. However, if the commodity is sold in exchange for money, the seller when setting the sale price rate can consider several factors including the timing of the payment. The sellers who are intrinsically-owned commodity may charge higher price rates and this is agreeable by the buyers due to some reason such as: the location of the shop is closer to the buyer; the seller is a trustworthy person; and, the seller gives the buyer a priority in buying his commodities over others. In these situations, the increase of the sale price is permissible.

According to the Supreme Court of Pakistan, the above reasons are among the reasons that allow the high commodity sale price. Similarly, if the seller increases the sale price because he authorizes credit payment to the buyer, provided there is no fraud. Islam permits both of these conditions because in both cases the commodity price is dependent on non-monetary commodity. The rate is fixed and cannot be increased by the seller.

Furthermore, according to the Pakistanis Supreme Court, when money is exchanged for money, excess is not allowed, whether the transaction is in cash or credit. However when commodities are sold for money, the commodity price may be higher than the market price subject to the terms of the contract, regardless the commodity transaction is in cash or credit.

Although *murabahah* under Islamic Law is acceptable, it is necessary to exercise caution as there are minor differences between them (*murabahah*) and the usury/interest based loans. In order to avoid this, all conditions imposed on *murabahah* must be complied with. According to the Supreme Court of Pakistan, *murabahah* can be abused and it is not an ideal Islamic transaction. It can only be used if *musharaka* and *mudarabah* are not available.



The Supreme Court of Pakistan also emphasized that the doctrine of necessity cannot be used as the reason on why usury-based transactions can be practiced. This doctrine can only be used temporarily pending the establishment of the full Islamic transaction system in the society.

Turning back to the above case, the High Court ruled that the plaintiff was entitled to the order for sale. However, the plaintiff must provide a substantial rebate to the customer purchaser on the sale price (defendant's debt and liability) based on the principle of justice as required by Islam. The rebate rate should refer to the market price and the principle of *ratio decidendi* in the case of *Affin Bank Bhd* and *Malayan Banking Berhad*. The Court will only authorize an application for an order for sale if the plaintiffs can provide a rebate at a fair rate to the defendant.

The decision of this case is also the decision in the cases of *Bank Islam Malaysia Berhad v. Azhar Osman & Ors* [2010] 5 CLJ 54, *Affin Bank Bhd v. Zulkifli bin Abdullah* [2006] 1 CLJ 438, *CIMB Islamic Bank Bhd v. LCL Corporation Bhd & Anor* [2011] 7 CLJ 594, *Affin Bank Bhd v. Zulkifli Abdullah* [2006] 1 CLJ 438 and *Malayan Banking Bhd v. Marilyn Ho Siok Lin* [2006] 3 CLJ 796. However, in the case of *Maybank Islamic Berhad & Malayan Banking Berhad v. Goh Siew Lan & Chong Peng* [2012] 1 LNS 1013 and *Bank Islam Malaysia Berhad v. Lim Kok Hoe & Anor and Other Appeals* [2009] 6 CLJ 22.

However, in some cases, the High Court does not allow *ibra'* (rebate) to be granted as there is no provision allowing this matter that has been spelt out in the BBA agreement. The court also ruled that the granting of the *muqassah (ibra')* is at the discretion of the bank although this term was not provided in the BBA agreement. This is the legal position in the case of *Bank Islam Malaysia Berhad v Adnan bin Omar* [1994] 3 CLJ 735, *Dato Haji Nik Mahmud Daud v. Bank Islam Malaysia Bhd* [1998] 3 CLJ 605, *Arab-Malaysian Merchant Bank Bhd v. Silver Concept Sdn Bhd* [2006] 8 CLJ 9 and *Bank Muamalat Malaysia Berhad v Noriza Tajudin* [2013] 1 LNS 854.

### **Suggestions and Conclusion**

It is the contention of the authors that, based on the above case law analysis the Court is divided into two (2) on the matter of the bank's right to impose the entire sale price (full sale price) when the customer purchaser terminates the BBA before the maturity period expires due to default or due to early settlement. In this regard, the authors suggest that Islamic banks in Malaysia and the Court need to find an equitable solution on this unfair matter as this can lead to losses, sufferings, grievances and injustices to the customer purchaser and to ensure that justice as enshrined under Islam, *ipso facto*, can be implemented. In this respect, the authors wish to quote Professor Dr. Zubair Hasan's verbatim on the rate of profit that Islamic Banks should adopt:

*“Islam exhorts the believers to excel in this world as well as the hereafter. It urges them to engage in all lawful pursuits for material gain, especially trade. But Islam is aware of men's inordinate love for material wealth. So it advises them to be moderate in their drive for profit in trade, behave in prescribed ways, and take only what is legitimate. It advocates for absolute honesty in business to the extent that false praise of the merchandise on sale is disallowed; rather known blemishes in it must be revealed to the customer. If there is a conflict between wealth and virtue*

*one must stay content with what is permissible even though it might be little. There are numerous verses in the Qur'an and traditions that remind men of the transient nature of this world relative to spiritual peace and puts by implication profit maximization under the control of Islamic moral discipline. But more significant is the scheme of distribution that stems from the Islamic view of economic justice: to each what one contributes to output but beyond a limit in the wealth one earns the deprived has a right that must be honored. Rewarding according to contribution in the face of uncertainty about the business outcome is the crux of distributive justice. Islam aims at shaping exchange relations among the factors of production on the basis of cooperation, mutual benefit and fair play. It directs people not to receive harm (loss) nor inflict it on others. One leading example of applying the edict is the principle of avoiding gharar (indeterminacy hazard) in deals. Keeping transactions gharar-free is expressive of the Islamic anxiety to prevent injury. This is evident from the Islamic approach to the determination of various functional returns in output we now discuss. The broad division of production factors we follow includes land, labour and capital.” (emphasis added) (Hasan, 2008).*

The authors also propose that the membership of the Shariah Advisory Council (SAC) of Malaysian Central Bank and Shariah Advisory Board (SAB) of the respective Islamic banks in Malaysia should also comprise of representatives from the consumer associations (for example, Persatuan Pengguna Islam (PPIM) (Muslim Consumers' Association of Malaysia), National House Buyers Association (NHBA), Federation of Malaysian Consumers Association (FOMCA) and Consumers Association of Penang (CAP)) in order to ensure that the decision making process in these bodies is sound and inclusive, thus can ensure that the products approved are truly 'consumer friendly', practical, equitable and fair to consumer public, not just being one sided and being banker-centric. This includes calling these parties to advocate the insertion of more equitable terms in the BBA for example terms that can provide a fair rate of the sale price that the customer purchaser should repay to the bank on default or on early settlement.

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